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No. 82-546

In the Supreme Court of the United States

OCTOBER TERM, 1982

BETTY J. BIRCH, PETITIONER

v.

JOHN H. LEHMAN, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly dismissed petitioner's suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), because it was not filed within thirty days of her receipt of the final decision by the EEOC on her appeal from the rejection of her complaint by the Department of the Navy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) and the opinion of the district court (Pet. App. A8-A14) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1982, and the petition for rehearing was denied on June 16, 1982 (Pet. App. A1, A7). The petition for a writ of certiorari was filed on September 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner alleges that she was discriminated against because of her sex in connection with her employment and termination from employment at the United States Navy Regional Medical Center at Camp Le Jeune, North Carolina. The Department of the Navy rejected her claim of

discrimination in the termination because it was not timely filed, and other allegations of discrimination were rejected for this or other reasons (Pet. App. A21). The EEOC affirmed the Navy's rejection of the termination claim as untimely and remanded the other claims to the Navy for further proceedings (*id.* at A21-A24).

Petitioner received the final EEOC decision on October 23, 1980 (Pet. App. A9). That decision specifically stated that it was "the Commission's final decision" and that petitioner had "a right to file a civil action in the appropriate United States District Court within thirty (30) calendar days of receipt of this decision" (*id.* at A25), as provided in 42 U.S.C. 2000e-16(c).[1]

Petitioner did not file a judicial action within that 30-day period. However, on November 20, 1982, petitioner filed a request that the EEOC reopen the case. EEOC regulations provide that the Commissioners may reopen and reconsider a decision if the requesting party presents new and material evidence that was not readily available when the decision was rendered, if the decision involves an erroneous interpretation of law or regulation or misapplication of established policy, or if the decision has broad precedential importance or is otherwise of an exceptional nature warranting the personal attention of the

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[1] 42 U.S.C. 2000e-16(c) provides in pertinent part:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section * * * an employee * * * if aggrieved by the final disposition of his complaint * * * may file a civil action as provided in section 2000e-5 of this title.

Commissioners. 29 C.F.R. 1613.235(a). The EEOC's decision in the case informed petitioner of her right to request a reopening (Pet. App. A25), but did not state that there was any particular time within which such a request had to be filed or that the filing of such a request would suspend the operation of the 30-day period for the filing of a judicial action.

Petitioner received the EEOC's denial of her request to reopen on May 21, 1981 (Pet. App. A9). That denial explicitly stated that the October 23, 1980 decision had been "the final decision in this matter," and it indicated that the time for filing a judicial action was governed by "the time limitations set forth in the final decision on the appeal" (Pet. App. A9-A10, A32). Petitioner filed this action on June 17, 1981 (*id.* at A5), more than eight months after her receipt of the EEOC's final decision on October 23, 1980. The district court dismissed the action as untimely, holding that "the filing of a request for reconsideration does not toll the running of the thirty-day period" and that "the notice of a right to sue in the final decision [was] not ambiguous or confusing" (Pet. App. A11). The court found an analogy to the Federal Rules of Civil Procedure, noting that although Rules 59 and 60 provides a method for obtaining an amendment of a judgment or relief from judgment, those Rules do not affect the finality of the judgment (*id.* at A12).

On appeal, petitioner argued that there was no final action by the EEOC until she was notified of the denial of her request for reopening and that she had 30 days from that date to file her district court action (Pet. App. A5). The court of appeals, however, affirmed the dismissal, stating that "[a]ccepting appellant's position would mean that no decision by the EEOC could be regarded with certainty as a 'final decision' since a plaintiff could revive his claim at any time, merely by requesting reconsideration. Such a result

would render the statutory 30-day requirement meaningless" (Pet. App. A5-A6).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is unwarranted.

1. Petitioner contends (Pet. 10-22) that the Fourth Circuit held that the 30-day time period for filing a civil action is a jurisdictional requirement that may never be tolled and that its holding therefore conflicts with decisions of this Court and other courts of appeals holding that the time periods for filing suit under Title VII are not jurisdictional. See, *e.g.*, *Zipes* v. *Trans World Airlines, Inc.*, No. 78-1545 (Feb. 24, 1982). This argument does not warrant review, for the court of appeals did not discuss compliance with the 30-day filing period as a jurisdictional absolute.

The district court recited petitioner's arguments that she had complied with the 30-day requirement in this case: (1) that she could reasonably infer from the final decision received on October 23, 1980, that the suit-filing period would be tolled pending a request for reconsideration, (2) that the notice in the October 23 decision at least created an ambiguity on the point that should bind the government, and (3) that she reasonably believed on the basis of prior case law that the period would be tolled (Pet. App. A10-A11). The district court did not reject these equitable arguments out of hand, as would be expected if the court viewed compliance with the 30-day period as an inflexible jurisdictional requirement. Rather, the court noted its concurrence with the decision in *Crane* v. *Hidalgo*, No. 80-1090-N (E.D. Va. Aug. 4, 1981), which held that "the filing of a request for reconsideration does not toll the running of the thirty-day period, and that the notice of a right to sue in the final decision is not ambiguous or confusing" (Pet. App. A11).

The court's use of the word "toll" and its rejection on the merits of petitioner's equitable argument regarding the asserted ambiguity or confusion in the notice suggests a view of the provision as stating a period of limitations.

On appeal, petitioner argued that there was no final action by the EEOC for purposes of 42 U.S.C. 2000e-16(c) until she was notified of the denial of the request to reopen the case and that she had 30 days from that notification within which to file suit (see Pet. App. A5). The court of appeals limited its opinion to this argument and concluded that the notice received on October 23, 1980 was intended by the EEOC to be—and was, for purposes of the statutory suit filing period—the EEOC's "final action" in the matter (*id.* at A5-A6). The court of appeals did not discuss whether the 30-day requirement states a jurisdictional requirement. This issue therefore plainly does not warrant review.

2. Petitioner next contends (Pet. 23-30) that the court of appeals erred in determining that the final EEOC decision from which the 30-day period began to run was that received on October 23, 1980, not the denial of the request to reopen. In support of this argument, petitioner relies on four decisions: *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970); *CAB* v. *Delta Airlines*, 367 U.S. 316 (1961); *Outland* v. *CAB*, 284 F. 2d 224 (D.C. Cir. 1960); and *B.J. McAdams, Inc.* v. *ICC*, 551 F. 2d 1112 (8th Cir. 1977). All, however, arose under other statutory schemes, not under Title VII. Each, moreover, involved judicial review of an agency's administrative decision. The question of what constitutes "final action" in such a setting is governed by the Administrative Procedure Act, 5 U.S.C. 704.[2] See *CAB* v. *Delta Airlines, supra*, 367 U.S. at 327 n.9.

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[2]The cases cited by petitioner at pages 30-34 of her petition fell in the same category.

A federal employee's suit under Title VII, in contrast, does not seek judicial review of the agency's or the EEOC's determination on his charge of discrimination, as under the APA; Title VII provides for a de novo judicial trial on the complaint of discrimination. *Chandler* v. *Roudebush*, 425 U.S. 840, 851-852, 861-862 (1976). Because the employee does not seek judicial review of the administrative determination and is entitled to a trial de novo without regard to that determination,[3] there may often be little reason to postpone the commencement of judicial proceedings pending a petition for reconsideration of the EEOC's administrative decision on the complaint.

In addition, in this case, the EEOC, the agency charged with administration of the statute, understood that its decision received by petitioner on October 23, 1980 was its final decision or action on the matter; it so stated in that decision and notified petitioner of her right to file a civil action within 30 days. Although the notice informed petitioner that she could request a reopening on the basis of newly discovered evidence or for other reasons, it did not suggest that the suit-filing period would be tolled if such a request were made (Pet. App. A25-A26). Moreover, when the EEOC denied the request to reopen in May 1981, it reiterated that the decision received by petitioner on October 23, 1980 had been its final decision in the matter, stating that petitioner "may" have a right to file a civil action "within the time limitations set forth in the final decision on the appeal" (*id.* at A32). Petitioner, of course, did not do so. Thus, petitioner did not follow the prescribed procedures in this case.

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[3]Thus, under Title VII, the plaintiff may file a civil action after the passage of 180 days, whether or not the agency or the EEOC has taken any action on his administrative complaint. 42 U.S.C. 2000e-16(d). He is not limited to seeking judicial review to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1).

The courts in Title VII cases also have held that the 30-day period runs from the date of the EEOC's decision on appeal, not the date of a denial of a request to reopen. In *Hofer* v. *Campbell*, 581 F. 2d 975, 977-988 (D.C. Cir. 1978), cert. denied, 440 U.S. 909 (1979), for example, the court of appeals specifically held that the 30-day time limit for filing suit under Title VII commenced with the adverse decision of the Civil Service Commission's Board of Appeals and Review,[4] and was not delayed until denial of the employee's request that the Commission reopen and reconsider the case. Accord: *Clark* v. *Goode*, 499 F. 2d 130 (4th Cir. 1974); *Chickillo* v. *C.O., Naval Air Engineering CTR.*, 406 F. Supp. 807 (E.D. Pa. 1976), aff'd, 547 F. 2d 1159 (3d Cir. 1977). See also *Canty* v. *Olivarez*, 452 F. Supp. 762 (N.D. Ga. 1978). As the court of appeals noted in *Clark*, accepting the argument that petitioner's time did not begin to run until the denial of her request for reopening would, in effect, deny finality to any decision of the EEOC.[5] It explained (499 F. 2d at 133-134):

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[4]The appeal function of the Civil Service Commission was transferred to the EEOC by Section 3 of Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807.

[5]To the extent petitioner argues (Pet. 30-36) that the 30-day period for filing a judicial action was tolled pending the disposition of her request that the EEOC reopen the appeal, that claim is unavailing in the circumstances of this case. Twenty-eight of the 30 days elapsed between October 23, 1980, when petitioner received the decision of the EEOC on appeal, and November 20, 1980, when she filed her request to reopen. Even if the further running of the 30-day period was tolled pending the EEOC's consideration of her request to reopen, that period began to run again on May 21, 1981, when petitioner received the notice of the EEOC's denial of her request to reopen. Yet she did not file her civil action until June 17, 1981, some 27 days later. Even allowing for an intervening period of tolling, then, a total of 55 days elapsed before she filed a civil action.

> [A]n aggrieved claimant could revive at any time his claim, however stale, by the simple expedient of filing, as the plaintiff did in this case, a request to reopen. It would not matter that he may already have requested and been denied a reopening. Similarly, it would be of no moment that, after final action by the Commission either on his original claim or on his request to reopen, he had not filed suit within thirty days. That requirement could be frustrated merely by filing a new request to reopen, and when that was denied, suit could be filed. Such a request would thus mock the thirty-day limitation for the institution of the suit, incorporated in the statute, and would do violence to the obvious legislative purpose evident in the statute.

Petitioner has offered no answer to the force of this reasoning. Because there is no conflict with any decision of this Court or of any court of appeals concerning this procedural question under Title VII, further review is not warranted.

We have been informed by the EEOC that it is developing proposals to clarify further its regulations relating to the procedural requirements in federal sector Title VII cases. We have alerted the EEOC to the particular issue presented here so that it may be addressed in such a procedural revision as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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